No. 88-884

Supreme Court, U.S.
FILED
DEC 27 1988
JOSEPH F. SPANIOL
CLERK

In The

Supreme Court of the United States

October Term, 1988

CAROLE KNEELAND, BELO BROADCASTING CORP., A.H. BELO CORP. d/b/a THE DALLAS MORNING NEWS, THE TIMES HERALD PRINTING CO. and DAVID EDEN,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and SOUTHWEST ATHLETIC CONFERENCE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT M. ROLLER*
KATHRYN E. ALLEN
GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB Tower
P. O. Box 98
Austin, Texas 78767
(512) 480-5600

GEORGE GANGWERE
SWANSON, MIDGLEY, GANGWERE, CLARKE & KITCHIN
1500 Commerce Bank Building
922 Walnut
Kansas City, Missouri 64105
(816) 842-9692

Attorneys for Respondent National Collegiate Athletic Association

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the court of appeals' decision that the NCAA is not subject to the Texas Open Records Act is contrary to any fact finding of the district court; and if so, whether the court of appeals applied the standard of review set out in Rule 52(a) of the Federal Rules of Civil Procedure.

2. Whether the court of appeals followed Texas law in construing the Texas Open Records Act.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Jurisdiction 1

Statement of the Case 1

Argument 3

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 6

Commissioner v. Estate of Bosch, 387 U.S. 456 (1967) 8

Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App. – Houston 1984, writ ref'd n.r.e.) 8

Huddleston v. Dwyer, 322 U.S. 232 (1944) 4

Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) 12

Kneeland v. National Collegiate Athletic Association, 850 F.2d 224 (1988) 4, 6

NCAA v. Tarkanian, 57 U.S.L.W. 4050 (U.S. Dec. 12, 1988) 7, 9, 10 11

Rendall-Baker v. Kohn, 457 U.S. 830 (1981) 5

United States v. General Motors Corp., 384 U.S. 127 (1966) 7

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 7

TABLE OF AUTHORITIES–Continued

Page

OTHER

Federal Rules of Civil Procedure, Rule 52(a).....2, 4, 7

Tex. Rev. Civ. Stat. Ann art. 6252-17a 2, 11

Section 1 12

Section 2(1)(F) 4

Tex. Atty. Gen. JM-821 (1988) 5, 9, 10, 11

Tex. Atty. Gen. ORD-343 (1983) 9, 10, 11

Tex. Atty. Gen. ORD-510 (1988) 3

No. 88-884

In The

Supreme Court of the United States

October Term, 1988

CAROLE KNEELAND, BELO BROADCASTING CORP., A.H. BELO CORP. d/b/a THE DALLAS MORNING NEWS, THE TIMES HERALD PRINTING CO. and DAVID EDEN,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and SOUTHWEST ATHLETIC CONFERENCE,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

Petitioners' Statement of the Case contains a number of inaccuracies. They imply in their Statement of the Case,

and their first point of error asserts, that the district court made findings as to contested issues of material fact that were subsequently rejected by the court of appeals. To the contrary, the court of appeals considered it necessary to review only one of the district court's fact findings, and determined that such finding survived scrutiny under Rule 52(a). The court of appeals simply reached a legal conclusion different from that of the district court as to the proper construction of the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon's Supp. 1989) (the "Act").

The remainder of Petitioners' inaccuracies reflect their efforts to minimize the broad sweep of the district court's opinion in this case. For example, they state that they sought NCAA records concerning only Texas member schools. The district court's order, however, requires disclosure under the Texas Act of the internal records of a national organization pertaining to both public and private institutions in Texas, and even to institutions outside the State (the University of Arkansas). Also, Petitioners imply that the district court ordered disclosure of only a few of the NCAA's records. Literally thousands of documents were brought from the NCAA's headquarters in Kansas, where they are generated and maintained, and were submitted for *in camera* inspection; the district court ordered disclosure of some portion of all but six of these.[1]

---

[1] In addition, Petitioners grossly overstate the amount of funds the NCAA receives from its Texas members, both public and private. They allege that the NCAA receives "hundreds of thousands of dollars" from them, when in fact the NCAA received $21,000.00 in dues during 1984-85 and $63,960.00 in television revenue assessments in 1981-85 from Texas member schools. (Stipulated in pretrial order p. 19; Pl. Ex. 18)

Petitioners also imply that the construction of the Act they advocate is endorsed by the Texas Attorney General. Instead, the Attorney General became involved in these proceedings merely to obtain a "clarification of the Panel's analysis." Supplemental Motion for Leave to File Brief as Amicus Curiae. He did not contend that the court of appeals reached the wrong result or that the NCAA is subject to the Texas Act. Rather, he "emphasize[d] that [he had] not reviewed the specific facts of this case and [did] not comment on the result of this case."[2] *Id.*

ARGUMENT

I.

No Special or Important Considerations Have Been Advanced That Would Warrant Review of This Case

This case remains in federal court due to pendent jurisdiction. At present, it concerns only the proper inter pretation of a state statute. The court of appeals considered all existing Texas authorities and reached a correct result. There is no issue meriting the attention of this Court.

---

[2] Indeed, the Attorney General has cited authoritatively the court of appeals' opinion in Tex. Atty. Gen. ORD-510 (1988). In his Amicus brief, the Attorney General simply requested that the court of appeals state more clearly that a "mechanical test" should not be applied and that *each* of the factors the court considered in this case are equally important in determining whether an organization is a "governmental body." Having considered all of those factors in this case, the court of appeals apparently saw no need for a clarification of the language of its opinion.

Construction of the pertinent provisions of a state statute, especially where as here no Texas appellate court has done so, does not present any special or important consideration that would warrant review pursuant to Supreme Court Rule 17. As this Court stated in *Huddleston v. Dwyer*, 322 U.S. 232 (1944), "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Id.* at 237. No "exceptional case" is presented here.

Moreover, as discussed below, the court of appeals correctly decided the case.

II.

Rule 52(a) Was Properly Applied In This Case

Petitioners incorrectly contend that the court of appeals failed to apply Rule 52(a) of the Federal Rules of Civil Procedure in deciding this case. To the contrary, the court of appeals expressly applied the "clearly erroneous" standard in reviewing the district court's factual determinations. *See Kneeland v. National Collegiate Athletic Ass'n*, 850 F.2d 224, 227 (1988) (district court's factual finding that Enforcement Division funds came from three revenue sources withstood clearly erroneous challenge). That court did not purport to overturn any fact finding of the district court.

The conclusion about which Petitioners complain is one of law, not of fact. The Act applies to each "governmental body" of the State of Texas, which includes the part of any organization that is "supported" by public funds of the state. *See* Section 2(1)(F) of the Act. The

nature of the financial relationship between Texas' public universities and the NCAA has never been disputed in this case. Whether these uncontested facts constitute "support" within the meaning of the statute is a pure issue of law, and the courts below treated it as such.

The court of appeals discerned from the Attorney General opinions on the subject three criteria used in determining whether a given private organization is subject to the Act. According to the Attorney General, a private organization may be deemed a "governmental body" if (i) it is not legally obligated to provide a "measurable" amount of service in exchange for a certain amount of money, as would be expected in a typical arms-length contract for services, (ii) the relationship between the organization and the government is closely intertwined so that they pursue a common purpose or maintain an agency type relationship, and (iii) the organization provides services traditionally performed by Texas government.[3] *E.g.*, Tex. Atty. Gen. JM-821 (1988).

In applying these criteria to the NCAA, neither the court of appeals nor the district court was forced to decide disputed fact issues. The purpose and function of the NCAA and its relationship with its member institutions is set out in the NCAA's constitution, by-laws, and regulations and was not controverted at trial. (Pl. Ex. 13) Similarly, the nature of the services rendered by the NCAA for the different sources of funds it receives from

---

[3] The analysis used by the Attorney General in determining whether an organization constitutes a "governmental body" is strikingly similar to this Court's analysis concerning whether an organization is a "state actor." *E.g., Rendall-Baker v. Kohn,* 457 U.S. 830 (1981).

Texas public member institutions are specifically delineated in the NCAA by-laws and not disputed in this case.[4] (*Id.*)

Based on the uncontested facts, the court of appeals concluded that the NCAA was not "supported" by public funds and was not a "governmental body" within the meaning of the Act. It does not perform traditional government functions (*Kneeland*, 850 F.2d at 229), there is no closely intertwined relationship or real identity of interest between it and its Texas public members (*Id.*), and the services provided by the NCAA are measurable as would be expected in an arms-length transaction (*Id.* at 230). Consideration of *all* of the criteria for determining whether an organization is a "governmental body" weighed heavily towards excluding the NCAA from the reach of the Act. The determinations made as to each criteria and the process of weighing them were simply conclusions of law based upon undisputed facts. Thus, in construing the extent of the Act's reach, the court of appeals was not required to, and did not, override any fact findings of the district court.

For this reason, this case is unlike *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), upon which Petitioners rely. There, the court of appeals reviewed a purely factual

---

[4] Moreover, in addition to the services set out in the court of appeals' opinion, the regulations of the NCAA provide that the NCAA pays a percentage of the receipts from NCAA championship events to the member institution that provides facilities and services in hosting the championship event, and provides for significant financial benefits to schools participating in the events. (P1. Ex. 13)

matter: whether the petitioner had been denied employment on account of her sex. The court of appeals in this case, on the other hand, disagreed with the district court's conclusion of law that the Texas Legislature intended to include organizations such as the NCAA within the Act's scope. *E.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966). Rule 52(a) simply does not apply in connection with the review of that conclusion.

Even assuming, however, that Rule 52(a) applies to the Fifth Circuit's review of the district court's conclusion as to the intended scope of the Act, the standard set out in that Rule was clearly surpassed. Rule 52(a) provides that a finding of fact shall not be set aside unless it is "clearly erroneous" – *i.e.*, the appellate court "is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). A fair reading of the Fifth Circuit's opinion and analysis unmistakably reveals that it was "definitely and firmly convinced" that the district court erred in concluding that the NCAA was subject to the Act. Furthermore, as discussed below, that conclusion based upon the undisputed facts was correct. Thus, whether the court of appeals' conclusion concerning the scope of the Act is characterized as a factual or legal determination, no error was committed in the context of Rule 52(a).

III.

The Court of Appeals Correctly Applied Texas Law

This Court has recently determined that the NCAA remains a private institution even when it threatens sanctions against a state institution. *NCAA v. Tarkanian*, 57

U.S.L.W. 4050 (U.S. Dec. 12, 1988). It is equally important to maintain the character of the NCAA as a private actor in its basic financial relations with its members, as the court of appeals recognized in this case.[5] Otherwise, this nationwide organization would find itself exposed to a welter of competing and possibly conflicting state open records laws. The district court's broad reading of the Act thus raises a host of difficult constitutional and choice of law issues about the permissible reach of state legislative powers.[6] There is no reason to decide such issues in this case.

The court of appeals correctly interpreted Texas law in determining that the NCAA was not "supported" by public funds, and thus was beyond the Act's coverage. Under *Erie*, its duty was to predict how the Supreme Court of Texas would construe the Act. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). No Texas appellate court has construed the term "support." The Texas Attorney General, whose decisions are not binding on the courts (*Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App. – Houston 1984, writ ref'd n.r.e.)), is the only

---

[5] If the NCAA is a "governmental body" of Texas for purposes of the Act because of its financial relations with the state, perhaps the NCAA and the state are joint actors for the purposes of the Fourteenth Amendment. Any such conclusion would sweep all NCAA activity into the public sector. *Tarkanian* clearly rejects any such position; not even the dissenting Justices took so broad a view.

[6] The NCAA on appeal raised the issues of whether the Act was intended to apply extra-territorially to internal records of the NCAA generated and maintained at its headquarters in Mission, Kansas; whether if it was so intended, it could constitutionally apply; and whether under choice of law principles the Act was applicable. It was not necessary for the court of appeals to reach any of these issues.

authority of record that has done so in any context. The Attorney General, however, has never interpreted the term "governmental body" in the context of a nationwide organization situated out of state such as the NCAA, or considered the lurking issues of the reach of state power that this question presents.

Moreover, as the court of appeals noted, the Attorney General in his opinions displays some confusion as to what organizations the Legislature intended to cover under the Act. Nevertheless, the court of appeals derived from those opinions a sensible analysis which it applied in this case.

In arguing that the court of appeals did not follow Texas law, Petitioners principally quibble over whether the court of appeals relied in part on one Texas Attorney General's opinion (ORD-343) that they urge had been subsequently overruled in another opinion (JM-821). Yet, the court of appeals did not rely solely on ORD-343 in interpreting the Act, but considered several Attorney General opinions, including JM-821.[7]

---

[7] As the court of appeals noted in its opinion, the analysis contained in ORD-343 of one of the factors to be used in determining whether an organization is a "governmental body" under the Act was not overruled in JM-821. Rather, the Attorney General in JM-821 simply found that the determination of what constitutes a governmental body under the Act should not turn on the manner of payment to an organization

(Continued on following page)

Based on its considered review of all of the pertinent Attorney General opinions, the court of appeals concluded that the NCAA is not subject to the Act. That court recognized that the NCAA pursues no traditional function of Texas government. And, it is contractually obligated to render many valuable services and to grant significant benefits, including substantial financial ones, in exchange for the relatively insignificant amount of funds it receives from its Texas members. Moreover, the relationship between the NCAA and its Texas member institutions is necessarily arms-length because of the investigative function it performs. Its Texas member schools do not exercise control over the NCAA's activities, nor is it an agent for them.[8] Thus, consideration of the factors enunciated by the Attorney General in his opinions clearly dictate, as held by the Fifth Circuit in this case, that the NCAA is not a "governmental body".

(Continued from previous page)

alone, which was controlling in ORD-343. Rather, other factors, such as the relationship between the organization and the government, should also be considered. Thus, JM-821 called into question the result reached in ORD-343 in that the existence of certain facts not considered when the opinion was rendered, such as the relationship between the organization involved in that opinion and the government, might change the result. The analysis in ORD-343 pertaining to whether the organization performed specific and measurable services in exchange for the funds it received, which was one of the analyses considered by the court of appeals, was not rejected in JM-821. That determination simply does not end the inquiry, as the court of appeals correctly recognized in this case.

[8] As the Court recognized in *Tarkanian*, the NCAA's relations with a state institution that is under investigation are essentially adversarial.

The Fifth Circuit's approach and decision in this case is not only consistent with Attorney General opinions but is also fully in accord with the Texas Legislature's Declaration of Policy set forth in the Act.[9] The Act was designed to make available to the public information concerning the affairs of Texas government and the conduct of the public officials of the state, to whom the citizens have delegated governmental authority (including the right to manage and expend public funds) so that the public may retain control over the instruments they have created and "may police the actions of their government." *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 676 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Plainly, the Texas Legislature did not intend that the Act reach organizations such as the NCAA. The NCAA,

---

[9] According to the Legislature, the Act was passed:

> "[p]ursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, [and because the public is] entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

Tex. Rev. Civ. Stat. Ann. art. 6252-17a § 1 (Vernon Supp. 1989).

which maintains its headquarters in Mission, Kansas, and is comprised of 900 member institutions located in all fifty states, is neither an instrumentality created by the citizens of Texas nor a repository of delegated governmental authority. Every available Texas resource indicates that the Act was designed to apply only to Texas governmental agencies and those nominally private organizations that are controlled by subdivisions of state government and perform traditional governmental functions. The Fifth Circuit's decision in this case was correct and comports with Texas law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT M. ROLLER
KATHRYN E. ALLEN
GRAVES, DOUGHERTY, HEARON & MOODY
2300 NCNB Tower
P. O. Box 98
Austin, Texas 78767
(512) 480-5600

GEORGE GANGWERE
SWANSON, MIDGLEY, GANGWERE,
CLARKE & KITCHIN
1500 Commerce Bank Building
922 Walnut
Kansas City, Missouri 64106
(816) 842-9692

Attorneys for Respondent
National Collegiate Athletic
Association